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No. 93-1605

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ALLIED VAN LINES, INC.,
Petitioner,

v.

GERALD OBERG, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae*. The written consents of both parties have been filed with the Clerk of this Court. The brief supports the petition for a writ of certiorari.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council ("EEAC" or "Council") is a voluntary association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes nearly 300 major U.S. corporations, as well as several associations which themselves have hundreds of corporate members. EEAC's directors and officers include many of industry's leading experts in the field of

equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members, and the constituents of its association members, are subject to the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (ADEA), as well as other equal employment statutes and regulations. As employers, and as potential respondents to ADEA charges and other employment-related claims, EEAC's members are interested in encouraging the voluntary resolution of such claims.

Thus, the issue presented in this appeal is extremely important to the nationwide constituency that EEAC represents. In essence, Respondents entered into a contract, declared the contract void, yet kept the benefit of the contract they say does not exist. Specifically, Respondents accepted special severance benefits in exchange for signing a general release of claims, including ADEA claims, and a covenant not to sue. They claim the release is void, yet have continued to retain the benefits even while filing suit under the ADEA. The court below ruled that because the releases arguably did not meet the minimum standards established in Section 201 of the Older Workers Benefit Protection Act (OWBPA), 29 U.S.C. § 626(f), Appellees were neither required to tender back the benefits as a prerequisite to filing suit nor deemed to have ratified the releases by retaining the consideration. Pet. App. 12a.[1] The court treats the consideration as a

[1] Citations to the Appendix to the Petition for a Writ of Certiorari are noted as Pet. App. ——. The opinion of the Court of Appeals for the Seventh Circuit below, reported at 11 F.3d 679, is reproduced as Pet. App. 1a-12a. The opinion of the district court, reproduced at Pet. App. 13a-34a, and an oral ruling of the district court, reproduced at Pet. App. 35a-65a, are not reported.

gratuity, which clearly was not contemplated by the original agreement.

This holding casts serious doubts on the finality of releases of claims and covenants not to sue under the ADEA. It allows plaintiffs to argue that their release is void and to sue the employer, but at the same time keep the benefit of the contract. As a result, employers who would not offer additional severance pay, early retirement incentives, and other termination benefits without the protection of a release, are likely to consider discontinuing such programs. Each discontinued program will harm the vast majority of individuals who receive such benefits and have no interest in filing discrimination charges.

Because of its interest in the application of the nation's civil rights laws, EEAC has, since its founding in 1976, filed over 335 briefs as *amicus curiae* in cases before this Court, the United States Circuit Courts of Appeals and various state supreme courts. As part of this *amicus* activity, EEAC has participated in this case before the Seventh Circuit as well as in numerous other cases involving the validity of waivers under the ADEA.[2] In addition, EEAC has briefed a number of employment issues in this Court under the ADEA.[3]

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[2] *See, e.g., Oberg v. Allied Van Lines*, Pet. App. 1a (ratification/tender back); *Wamsley v. Champlin*, 11 F.3d 534 (5th Cir. 1993) (reproduced at Pet. App. 72a) (ratification/tender back); *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), *reh'g denied* (11th Cir. June 22, 1992), *cert. denied*, 113 S. Ct. 412 (1992) (ratification/tender back); *Adams v. Brown-Forman Corp.*, 963 F.2d 323 (11th Cir. 1992) (EEOC supervision not needed); *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358 (4th Cir.), *cert. denied*, 112 S. Ct. 177 (1991) (ratification/tender back); *Cirillo v. Arco Chem. Co.*, 862 F.2d 448 (3d Cir. 1988) (EEOC supervision not needed); *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539 (8th Cir.), *cert. denied*, 482 U.S. 928 (1987) (same); *Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir.), *cert. denied*, 479 U.S. 850 (1986) (same).

[3] *E.g., Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993) (liquidated damages); *Gilmer v. Interstate/Johnson Lane Corp.*,

Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of its significant experience in these matters, EEAC is uniquely situated to brief this Court on matters not previously brought to its attention by the parties.

STATEMENT OF THE CASE

In December 1990, Allied Van Lines ("Allied") underwent a general reduction in force in which over 60 employees were terminated, including Respondents. Pet. App. 2a. Allied offered departing employees their choice of two severance pay packages. One package offered two weeks' salary. The other provided approximately twenty weeks of additional pay in exchange for executing a "Severance Agreement." *Id.* The Severance Agreement included a general release, including a release of claims under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (ADEA), and an agreement not to assert such claims. Pet. App. 3a, n.1. It also contained a commitment to return the benfits paid in the event of a breach of the agreement. Pet. App. 3a, n.2.

Respondents all chose to sign the Agreement and take the additional severance benefit. Pet. App. 2a. They also received continuing health benefits and pension contributions. Pet. App. 3a. Despite their having sued Allied, none of the Respondents has returned, or has offered to return, any of these benefits. Pet. App. 4a.

Shortly after receiving their last benefit payments from Allied, Plaintiffs filed ADEA charges against Allied

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500 U.S. 20 (1991) (enforceability of arbitration agreement); *Astoria Fed. Savs. & Loan Ass'n v. Solimino*, 111 S. Ct. 2166 (1991) (effect of unreviewed state agency finding); *Public Employees Retirement Sys. of Ohio v. Betts*, 492 U.S. 158 (1989) (applicability to employer-provided benefits); *McLaughlin v. Richland Shoe*, 486 U.S. 128 (1988) (liquidated damages); *TransWorld Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) (liquidated damages).

with the Equal Employment Opportunity Commission ("EEOC"), claiming that they had been replaced by younger employees. Pet. App. 3a-4a. Before the EEOC completed its investigation, all three filed a class action complaint under the ADEA. Pet. App. 4a. Allied moved to dismiss, or in the alternative for summary judgment, arguing that Plaintiffs had ratified the releases by retaining the benefits and by failing to tender back the consideration. *Id.* The district court below denied the motion, and the Seventh Circuit affirmed. Allied now has petitioned this Court for a writ of certiorari.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The decision of the Seventh Circuit below allows Respondents to sign a contract, declare it void, and refuse to return the consideration. They have retained this benefit under false pretenses by treating the contract as if it never existed. The decision below conflicts directly with the decision of the Fifth Circuit in *Wamsley v. Champlin Refining and Chemicals, Inc.*, 11 F.3d 534 (5th Cir. 1993). Indeed, the Fifth Circuit specifically expressed its disagreement with the decision below. *Id.* at 540 n.11 and 541 n.13. In *Wamsley*, the Fifth Circuit concluded that a release that may not meet the minimum requirements of the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f), is ratified if the plaintiff keeps the consideration. Thus, a potential plaintiff wishing to repudiate the release must first tender back the consideration. The Fifth Circuit also correctly observed that the Seventh Circuit's approach undoubtedly would discourage employers from offering releases and thus lucrative severance benefits and other incentives given in exchange.

This conflict creates substantial uncertainty in the law on an issue of substantial importance, particularly for employers doing business in both the Fifth and Seventh Circuits and elsewhere.

In addition, the Seventh Circuit misapplied this Court's 1968 decision in *Hogue v. Southern R. Co.*, 390 U.S.

516 (1968), under the Federal Employees Liability Act, 45 U.S.C. § 51 *et seq.*, to infer federal common law precluding ratification of ADEA releases and eliminating the tender back requirement. As the Fifth Circuit recognized in *Wamsley, Hogue* is not analogous because of the significant differences between the FELA and the ADEA. There was no dispute that Hogue ultimately would be due at least as much compensation as he already had received. The dispute was over whether his injuries were greater than originally perceived. The case involved a mutual mistake of fact, not a wholesale breach of a promise not to sue.

For these reasons, this Court should grant the petition, adopt the reasoning of the Fifth Circuit and reverse the decision below.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' HOLDING THAT A POTENTIAL ADEA PLAINTIFF WHO SIGNS A RELEASE OF CLAIMS NEVERTHELESS MAY DECLARE THE RELEASE VOID AND BRING AN ADEA LAWSUIT WITHOUT FIRST TENDERING BACK THE CONSIDERATION CONFLICTS DIRECTLY WITH THE FIFTH CIRCUIT'S DECISION IN *WAMSLEY v. CHAMPLIN REFINING AND CHEMICALS, INC.*, CREATING UNCERTAINTY IN THE LAW ON AN ISSUE OF SUBSTANTIAL IMPORTANCE

A. The Decision Below Conflicts Directly With The Fifth Circuit's Rule

In *Wamsley v. Champlin Refining and Chemicals, Inc.*, 11 F.3d 534 (5th Cir. 1993),[4] a case substantially similar to this one, the Fifth Circuit ruled that an employee who has executed a release of claims including claims under the Age Discrimination in Employment Act, 29 U.S.C.

[4] The *Wamsley* decision is reproduced as Appendix H to the Petition (Pet. App. 72a-86a).

§ 621 *et seq.*, must tender back the consideration in order to avoid the release. *Id.* at 542. By retaining the consideration, the Fifth Circuit held, the employee by his conduct ratifies an otherwise voidable contract. *Id.* at 540.

In so doing, the Fifth Circuit specifically acknowledged that "we find ourselves in respectful disagreement with the Seventh Circuit's recent decision in *Oberg v. Allied Van Lines* . . . ." *Id.* at 540 n.11. Indeed, the Fifth Circuit considered, and rejected, each of the positions taken by the Seventh Circuit below.

B. As The Fifth Circuit Correctly Observed, The Seventh Circuit's Ruling Will Discourage Employers From Voluntarily Making Such Offers

The Fifth Circuit decision points out that an interpretation making void defective ADEA releases "would be inconsistent with one of the expressed purposes of the ADEA: to 'help employers and workers find ways of meeting problems arising from the impact of age on employment.'" 11 F.3d at 539 (Pet. App. 80a) (quoting 29 U.S.C. § 621(b)). "The simplest and easiest way to further this purpose," the Fifth Circuit stated, "is to give effect to private agreements which resolve age related employment problems without the inevitable delays and costs associated with litigation." *Id.* Accordingly, the Fifth Circuit continued:

> Were employers forced to assume the risk that noncompliance with all of [the] statutory requirements of section 626(f)(1) renders a waiver agreement for which they have paid valuable consideration void and thus, not capable of being ratified, clearly they would be disinclined to propose such solutions.

Id.

The Fifth Circuit is quite correct. Like Allied, many employers who are faced with the necessity of workforce reductions offer lucrative severance benefits, far in excess

of any to which the employees otherwise would be legally entitled, to ease the impact of lost employment. These programs offer substantial financial benefits. Some employers, depending upon financial circumstances and other considerations, also offer early retirement incentives and other voluntary termination programs in lieu of layoffs.

Because these employers voluntarily are offering benefits considerably greater than they are legally obligated to pay, they frequently require that the employees who choose to receive these additional benefits execute a release of claims in return. Of course, an employee cannot be forced to sign a release against his or her will, but those who do not sign will not receive the additional benefit. In this manner, the employer buys peace, and employees who choose to participate receive a substantial benefit.

The decision below, as the Fifth Circuit noted, would allow disgruntled former employees to renege on the commitment they made while retaining the consideration paid to them in exchange for that commitment. Merely by alleging that the minimum requirements of the OWBPA were not met, they could circumvent their promise and plunge the employer into litigation. Indeed, the decision below encourages plaintiffs and their counsel knowingly to sign releases that do not comply with the OWBPA in order to receive benefits to which they are not otherwise entitled, even though they have no intention of honoring the release agreement.

This unfair result so limits the utility of waivers that they would become virtually useless to employers. As the Fifth Circuit recognized, it follows that employers who choose not to provide additional severance benefits without a release in return simply will cease offering such benefits.

Since force reductions still may be a financial necessity or business option from time to time, however, layoffs will still occur—but without the additional severance ben-

efits offered in the past. As a consequence, the many employees who face layoffs but have no grounds to challenge their terminations will be deprived of a substantial payment that might mean the difference between financial security and financial peril.

C. The Conflict Between The Circuits Causes Substantial Uncertainty In The Law

The wholesale disagreement between the Fifth and Seventh Circuits on the ratification/tender back issue causes substantial uncertainty for the major employers who are EEAC's members. Many of these employers have operations in numerous states. Thus, it is not unusual for the same employer to do business in Louisiana, Mississippi or Texas, which comprise the Fifth Circuit, and also in Illinois, Indiana and Wisconsin, in the Seventh Circuit.

The conflict between the Fifth Circuit's *Wamsley* decision and the Seventh Circuit's decision below results in an untenable situation for employers who do business in both circuits. An employer implementing a corporate-wide force reduction, for example, may find it worthwhile to offer generous severance benefits to employees in Dallas who sign releases, but not to offer similar benefits to employees in Chicago who do so, since the Chicago employees can keep the consideration and proceed with ADEA lawsuits. Some employers may opt to avoid this inequity by ceasing to offer special severance benefits in either circuit.

Employers doing business in other circuits also face inconsistency in the law surrounding releases. In cases arising prior to the effective date of the OWBPA, two other circuits issued conflicting opinions. The Fourth Circuit, in *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358, (4th Cir.), *cert. denied*, 112 S. Ct. 177 (1991), ruled that the ratification/tender back doctrine applies to bar an ADEA claim where the employee has failed to return the consideration. Conversely, in *Forbus v. Sears, Roebuck and Co.*, 958 F.2d 1036 (11th Cir.), *cert. denied*,

113 S. Ct. 412 (1992), the Eleventh Circuit ruled to the contrary.[5]

Accordingly, employers who are considering offering severance benefits or exit incentives in exchange for a release are left with no clear direction. They know the enumerated OWBPA requirements for a valid release of ADEA claims. Yet they also know, as one commentator has stated, that "[t]he nature of some of the OWBPA conditions . . . may make achieving-and proving-compliance more difficult than it seems and could undermine the certainty and expense control that a release agreement is designed to afford." Glen D. Nager and Steven T. Catlett, *Employees Can't Have Their Cake and Eat It Too: Estopping Age Discrimination Complainants Who Have Signed Releases*, 19 Employee Rel. L. J. 295, 296-97 (1993). For example, a prospective plaintiff can raise a factual issue concerning the validity of the release merely by alleging, as the plaintiffs did in *Wamsley*, that they were told orally they had less time than the statutory minimum to consider and sign the release. Yet, the courts of appeals differ greatly on whether the plaintiff will be permitted to retain the benefits of his bargain while repudiating the obligations.

D. Unlike The Seventh Circuit, The Fifth Circuit Correctly Concluded That A Release That May Not Comply With The Older Workers Benefit Protection Act Is Ratified If The Plaintiff Keeps The Consideration

Section 201 of the Title II of the Older Workers Benefit Protection Act (OWBPA) amended the ADEA to es-

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[5] Indeed, this conflict already has subjected the same company to opposing decisions. *Compare Forbus v. Sears, Roebuck and Co.*, 958 F.2d 1036 (11th Cir.) (tender back not required/no ratification), *cert. denied*, 113 S. Ct. 412 (1992), with *Grillet v. Sears, Roebuck and Co.*, 927 F.2d 217 (5th Cir. 1991) (release ratified due to failure to tender back consideration). Both of these cases involved ADEA releases executed before the effective date of the OWBPA, and both involved Sears, Roebuck and Company.

tablish minimum standards for a waiver of claims. 29 U.S.C. § 626(f).[6] The statutory language states that:

> An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. . . [A] waiver may not be considered knowing and voluntary unless at a minimum [it meets the established standards].

Id. Because of the "may not waive" language, the Seventh Circuit below concluded that a waiver that did not meet the minimum standards was incapable of being ratified. Pet. App. 6a.

In a carefully reasoned analysis, the Fifth Circuit disagreed that this language precludes ratification. As the Fifth Circuit explained:

> We do not interpret the language of section 626 (f)(1) to mean that a waiver which fails to meet the requirements of subsections (A) through (H) is void of legal effect. Rather, we interpret it to mean that such waivers are not knowing and voluntary and thus are subject to being avoided at the election of the employee. This interpretation comports with the language of section 626(f)(1) and is supported by the legislative history of the OWBPA.

11 F.3d at 539 (Pet. App. 79a).

Accordingly, the Fifth Circuit reasoned, an arguably defective release can be ratified through subsequent conduct. As the Fifth Circuit pointed out:

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[6] The requirements include: (1) an understandable written agreement; (2) with a direct reference to the ADEA; (3) that operates only retroactively; (4) in exchange for consideration. In addition, the individual must be given (5) written advice to consult an attorney and the requisite period of time to make and revoke a decision, and a seven-day revocation period. 29 U.S.C. § 626(f)(1). There are additional requirements where the waiver "is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees." *Id.*

> Note that the court is not enforcing the promises contained in any of the allegedly voidable waiver agreements as such. What the court is enforcing is a new promise, evidenced by subsequent conduct, to be bound by the terms of the original waiver agreements. Therefore, that the original waiver agreements may not have been in compliance with § 626 is of no consequence.

11 F.3d at 540 (Pet. App. 81a-82a n.11). The Seventh Circuit, in contrast, held in effect that a waiver that fails to meet the minimum OWBPA standards is void *ab initio* rather than voidable and thus cannot be ratified. Nevertheless, the Seventh Circuit allowed the plaintiffs to retain the consideration they received.[7]

As the Fifth Circuit noted, the Seventh Circuit's holding below fails to take into consideration several key elements indicating that Congress intended potentially defective ADEA waivers to be voidable, not void. Neither the statute nor the legislative history of OWBPA bars application of the ratification/tender back doctrine. 11 F.3d at 539 n.8 (Pet. App. 79a n.8). Under well-accepted principles of statutory interpretation, "where a common-law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 111 S. Ct. 2166, 2169-70 (1991) (citations and quotations omitted).

Moreover, Section 626(f)(1)(G) specifically provides for a seven day revocation period following execution of

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[7] Indeed, the dispute over whether a contract is void (and cannot be ratified) or voidable (and can be ratified) may be a bit too esoteric. Under either analysis, the plaintiff is trying unjustly to keep the proceeds of a contract which he says does not exist. But the money would not have been received by the plaintiff unless he had agreed to the contract in the first place. A typical employer will conclude that the situation is obviously unfair and will have to consider whether to give additional severance pay under such circumstances. *See* part I.B. above.

the agreement, during which the agreement is neither effective nor enforceable. 29 U.S.C. § 626(f)(1)(G). If failure to comply with another requirement made the agreement void, there would be no need for this section. 11 F.3d at 539 (Pet. App. 80a).

Thus, EEAC urges the Court to grant the petition and reverse the Court below, adopting instead the analysis used by the Fifth Circuit in *Wamsley*.

II. THE DECISION BELOW INCORRECTLY APPLIES THIS COURT'S DECISION IN *HOGUE v. SOUTHERN R. CO.* TO DENY EMPLOYERS THE CERTAINTY GRANTED BY THE RATIFICATION/TENDER BACK DOCTRINE

The court below misapplied this Court's decision in *Hogue v. Southern R. Co.*, 390 U.S. 516 (1968), to reach the conclusion that the common law ratification/tender back doctrine should not apply to ADEA releases. Indeed, the Fifth Circuit in *Wamsley* considered and rejected the applicability of *Hogue* to the issue presented here, specifically disagreeing with the court below. 11 F.3d 534, 540-42 and n.13 (Pet. App. 82a-86a).

A. *Hogue* Interprets The FELA, Which Provides A Type Of Workers' Compensation For Railroad Employees

Hogue involved a claim under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* (FELA). In *Hogue*, a worker who injured his knee while working for the defendant railroad relied on the railroad's doctor's assurances that his injury was only a bruise. He signed a release in exchange for $105. Later, after two operations including removal of his kneecap, he sought to reopen the claim but did not return the original $105. When the railroad sought to enforce the release, this court concluded that "a tender back is . . . not requisite when it is pleaded that the carrier and the employee entered into the release from *mutual mistake* as to the *nature and ex-*

tent of the employee's injuries." *Hogue*, 390 U.S. at 517 (emphasis added).[8]

The Court's ruling in *Hogue* is not surprising. The FELA provides a cause of action closely approximating workers compensation for railroad employees injured on the job.[9] The FELA "was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety." *Sinkler v. Missouri Pac. R.R.*, 356 U.S. 326, 329 (1958). As the Court has explained, "[t]he cost of human injury, an inescapable expense of railroading, must be borne by someone, and the FELA seeks to adjust that expense equitably between the worker and the carrier." *Id.* It would have made no sense to make Hogue give back the $105, as all agreed he was entitled to at least that much compensation.

The FELA effectuates this purpose by providing a remedy for an injured worker in virtually any situation where the employer's negligence was even remotely a contributing cause of the injury.[10]

> Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion

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[8] Instead, the Court directed, the original amount should be deducted from the ultimate award. *Hogue*, 390 U.S. at 518.

[9] While the FELA is not a true "workers compensation" scheme imposing liability without fault, *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 509 (1957), it is "an avowed departure from the rules of the common law . . ." *Sinkler v. Missouri Pac. R.R.*, 356 U.S. 326, 329 (1958) (citing *Rogers*, 352 U.S. at 507-509).

[10] The operative provision, 45 U.S.C. § 51, states:

> Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

> that employer negligence played *any part, even the slightest*, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played *any part at all* in the injury or death."

Rogers v. Missouri Pac. R.R., 352 U.S. 500, 506-07 (citations omitted) (emphasis added). *See also Webb v. Illinois Cent. R.R.*, 352 U.S. 512, 516 (1957); *Krienke v. Illinois Central R.R.*, 249 F.2d 840, 844 (7th Cir. 1957). Traditional common law defenses such as contributory negligence, assumption of the risk, and the fellow servant doctrine are unavailable under the FELA.[11] Instead, "[t]he burden of the employee is met, *and the obligation of the employer to pay damages arises*, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference [that negligence of the employer played a small part in the injury]." *Rogers*, 352 U.S. at 508 (emphasis added). Thus, entitlement to damages for an FELA claim is significantly less difficult to establish than in other fault-based litigation.

B. Because Of The Significant Differences Involved, *Hogue* Is Inapposite To The Case At Bar. As Hogue's Damages Could Not Be Less Than Already Received —No Tender Back Was Needed

The court below grafted the *Hogue* holding onto a situation far different from the one that *Hogue* actually addressed. Because the actual issues, as well as the two statutes in question, have virtually nothing in common, the

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[11] 45 U.S.C. § 53 (contributory negligence); 45 U.S.C. § 54 (assumption of the risk); 45 U.S.C. § 51 (fellow servant doctrine).

decision below incorrectly applied *Hogue* to the situation presented here.

In *Hogue*, the "mutual mistake" was as to the nature and extent of the injuries. 390 U.S. at 516. Liability was not at issue. The issue to be resolved was the extent of Southern Railway's liability *beyond* the first $105. Thus, Hogue was entitled at least to the $105 under all circumstances, and there was no reason to require that he tender back the first installment. Indeed, tender back was not even a legitimate issue.[12]

In contrast, while Respondents could have chosen to retain their rights to assert the liability of Allied Van Lines in the instant case, they voluntarily chose to forego that option in return for a large amount of money. Respondents were not entitled to the amount at issue except as consideration for their agreement to release all claims and covenant not to sue. The consideration was not in satisfaction of any existing predetermined obligation. There was no common agreement that the plaintiffs were entitled to a minimum specific amount as compensation for an admitted statutory injury, and there was no mistake of fact as to the amount due. In contrast to *Hogue*, there is a substantial question whether Respondents were victims of age discrimination at all or would be entitled to *any* compensation from Allied on their age discrimination claims. Rather than face the uncertainty of litigation, Respondents agreed to accept this consideration.

Moreover, as the Fifth Circuit pointed out in *Wamsley*, the court below followed *Hogue* without considering the differences between the FELA and the ADEA. 11 F.3d 534, 541 n.13 (Pet. App. 85a). Instead, it relied solely on the general observation that both are "remedial" statutes and thus should be treated alike. Unlike the "resource allocation" approach taken by the FELA, however,

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[12] Notably, moreover, the employer in *Hogue* did not file a brief or present argument on the "tender back" issue. *Hogue*, 390 U.S. at 516.

the ADEA provides a remedy only where an employer has engaged in an unlawful employment practice. 29 U.S.C. § 623(a). The FELA was intended to "adjust[] the losses and injuries inseparable from industry and commerce to the strength of those who in the nature of the case ought to share the burden," S. Rep. No. 460, 60th Cong., 1st Sess. 3, *quoted in Sinkler*, 356 U.S. at 330 (1958). By contrast, the ADEA's prohibitions are intended "to promote employment of older persons based on their ability rather than age; to prohibit *arbitrary* age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment. 29 U.S.C. § 621(b) (emphasis added).

Indeed, to prevail in an ADEA claim for discriminatory termination, for example, "the plaintiff must ultimately prove that she was discharged because of her age." *Anderson v. Stauffer Chem. Co.*, 965 F.2d 397, 400 (7th Cir. 1992). Unlike the FELA—where the plaintiff need only show that the employer's conduct played only the "slightest" part in the injury—the plaintiff in an ADEA case must prove "that age was a 'determining factor' or a 'but for' element in the employer's decision." *Id.* (quoting *La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1409 (7th Cir. 1984)). *Cf. St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2751 (1993) ("[W]e have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines, according to proper procedures, *that the employer has unlawfully discriminated*.") (emphasis in original).

Thus, while the FELA effectively allocates damages to the employer based on ability to pay, the ADEA imposes liability only where the plaintiff proves not only that the employer's conduct affected the plaintiff, as under the FELA, but also that the plaintiff's age was involved in the employer's action. Accordingly, as a practical matter, recovery by a railroad employee who is injured on the

job is far more probable than an employee who claims that an adverse employment action was based on age.

Thus, *Hogue* is decidedly inapposite to the case presently before this Court, and its use by the Seventh Circuit is having a decidedly negative impact on the continued use of severance pay. While *Hogue* may represent "federal common law" under the FELA, it does not follow that *Hogue* should be applied to every situation where the obligation to tender back consideration for a release is the issue. For the reasons stated above, it should not be applied in the circumstances presented in this case.

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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